

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES**

**M & M AFFORDABLE PLUMBING**

**and**

**Case 13-CA-121459**

**JEFFERY CEREN, an Individual**

*Helen Gutierrez, Esq.,*  
for the General Counsel.  
*Patrick M. Griffin, Esq.,*  
for the Respondent.

**SUPPLEMENTAL DECISION**

**STATEMENT OF THE CASE**

MELISSA M. OLIVERO, Administrative Law Judge. This supplemental proceeding tried in Chicago, Illinois on August 10, 2017, and telephonically on August 22 and September 21, 2017, pursuant to a compliance specification and notice of hearing issued on October 30, 2015. (GC Exh. 1(f).) The compliance specification alleges the amount of backpay due under the terms of the National Labor Relations Board's Order (the Board's Order) dated August 4, 2015, adopting the findings and conclusions set forth in my decision issued November 19, 2014. (GC Exh. 1(a), (d).) The National Labor Relations Board (Board) found that M & M Affordable Plumbing (Respondent) unlawfully discharged Jeffery Ceren (Ceren), ordered that Respondent reinstate him to his former, or a substantially equivalent, position and make him whole for any losses he suffered as a result of the unlawful discrimination against him.<sup>1</sup> (GC Exh. 1(d).)

**I. Background**

The decision in the above-captioned unfair labor practice proceeding directed M & M Affordable Plumbing (Respondent), its officers, agents, successors, and assigns, to take certain affirmative action, including offering former employee Jeffery Ceren reinstatement to his former position and making him whole for any loss he may have suffered as a result of Respondent's unlawful termination of his employment in violation of Section 8(a)(3) and (1) of the National

---

<sup>1</sup> Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

Labor Relations Act (Act). With respect to that remedy, I ordered that backpay be computed on a quarterly basis from the date of the discharge to the date when the offer of reinstatement was made, less any net interim earnings, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987),  
 5 compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

I further ordered Respondent to file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters and to compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards  
 10 covering periods longer than 1 year. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).

Respondent filed exceptions to my decision. After considering my decision and the record in light of the exceptions and briefs, the Board affirmed my ruling, findings, and conclusions, and  
 15 adopted the order as modified. (GC Exh. 1(d).)

The compliance specification herein was issued on October 30, 2015. After requesting and receiving an extension of time to file an answer, Respondent filed its answer to the compliance specification on November 27, 2015. (GC Exh. 1(h), (i), (m).) Respondent's answer asserted  
 20 that the Board's decision of August 4, 2015, was made in error and that it did not owe backpay to Ceren. (GC Exh. 1(m).) Respondent further generally denied the General Counsel's computations regarding the amount of backpay and other relief owed to Ceren. (GC Exh. 1(m).)

Counsel for the General Counsel (General Counsel), by way of a letter dated November 30, 2015, advised Respondent's counsel that Respondent's answer to the compliance specification did not comply with the requirements set forth in Section 102.56 of the Board's Rules and Regulations. (GC Exh. 1(p), Exhibit H.) The General Counsel advised Respondent's counsel that Respondent could amend its answer to cure the alleged defects by December 7, 2015. (Id.)  
 25 No amended answer was filed.

On December 11, 2015, the General Counsel filed a Motion for Partial Summary Judgment with the Board. (GC Exh. 1(p).) On December 18, 2015, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted. (GC Exh. 1(r).) Respondent filed an answer and a brief in opposition to  
 30 the General Counsel's motion on January 4, 2016. (GC Exh. 1(q), (r).)

On March 23, 2017, the Board issued a Supplemental Decision and Order (Board's Supplemental Decision) granting the General Counsel's motion. (GC Exh. 1(r).) The Board found, inter alia, that Respondent's answer to the compliance specification did not satisfy the requirements of Section 102.56(b) of the Board's Rules and Regulations regarding: the backpay period, gross backpay, and excess tax liability. (Id.) The Board, however, found that  
 40 Respondent's general denial regarding interim earnings and expenses was sufficient to warrant a hearing on those issues. (Id.) Accordingly, the Board ordered a hearing limited to the issue of Ceren's interim earnings and expenses. (Id.)

Pursuant to the Board's Supplemental Decision, on August 10, 2017, and telephonically on August 22 and September 21, 2017, I conducted a hearing limited to the issue of Ceren's interim earnings and expenses.<sup>2</sup> After carefully considering the briefs of the parties and the entire record, for the reasons set forth below, I find that Respondent owes \$121,257 to Ceren, plus interest and applicable tax liability.<sup>3</sup>

### THE COMPLIANCE SPECIFICATION

The Board has already granted partial summary judgment to the General Counsel on the issues of the backpay period, gross backpay, and excess tax (paragraphs I, II, III, and VI of the compliance specification). The Board made numerous findings in its granting of partial summary judgment, as set forth herein. As alleged in the compliance specification, the backpay period began on September 24, 2013, the date of Ceren's discharge, and will end when Respondent extends Ceren a valid offer of reinstatement or when Respondent's reinstatement obligation is otherwise extinguished for nondiscriminatory reasons. The calendar quarters as described in the compliance specification consist of consecutive calendar months, starting January 1, April 1, July 1, or October 1. Each complete calendar quarter consists of 13 weeks and/or an average of 65 working days. Each complete workweek consists of 5 days.

An appropriate measure of the gross backpay due Ceren is his total annual salary divided by the number of hours worked by a full-time employee and the value of the pretax benefit received as fuel from Respondent's gas pump. Ceren's negotiated annual salary is assumed to reflect full-time employment of 40 hours per week, 520 hours per calendar quarter, and 2080 hours per calendar year. Ceren's basic wage rate is equal to the total annual negotiated salary (\$105,000) divided by 2080 hours beginning on August 12, 2013, his approximate date of hire.<sup>4</sup> (See GC Exh. 1(f), Exh. 1.)

---

<sup>2</sup> The General Counsel filed a motion to correct the transcript on November 16, 2017. Many of the requested corrections are to the General Counsel's opening statement. I do not find it necessary to make changes to this part of the transcript. It is well-settled that arguments and statements of counsel are not evidence. *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 93 (2017), citing *Chicago Typographical Union 16 (Chicago Sun-Times)*, 296 NLRB 180, 182 fn. 4 (1989). However, I grant the General Counsel's motion with regard to the following errors in the transcript: p. 22, ll. 5-7 of the transcript should read, "In the time between your discharge and the time when you started working for CMTS did you work anywhere else?;" p. 26, l. 5, p. 27, l. 11, p. 37, l. 17, and p. 75, l. 19 of the transcript should read "MJN Plumbing;" p. 3, l. 20 of the transcript should read, "Morisey-Dart;" p. 49, ll. 8-10 of the transcript should read, "It's a copy of a check with a statement from Morgan Stanley which is my retirement account for \$2100 withdrawn from my account;" p. 50, l. 14 of the transcript should read, "What was the gross amount of the distribution?;" p. 51, l. 20 of the transcript should read, "About \$610;" p. 57, ll. 5-6 of the transcript should read, "Did you withdraw money from your retirement fund in 2015?;" p. 62, ll. 20-21 of the transcript should read, "By hearing are you referring to the ULP hearing that took place in 2014?;" and p. 66, ll. 4-5 of the transcript should read, "The total amount included for penalties of \$2850."

<sup>3</sup> Respondent's backpay, tax, and interest liability shall continue until Respondent makes Ceren a valid offer of reinstatement or its liability is extinguished for nondiscriminatory reasons.

<sup>4</sup> In addition to his salary, Ceren received compensation by the provision of gasoline on a weekly basis as a nontaxable benefit to defray his transportation expenses. Based on an average retail price of \$3.65 per gallon in 2013 according to the U.S. Energy Information Administration ("EIA")

Ceren is entitled to annual increases in salary effective in the pay period immediately following the anniversary of his hire date. The amount of Ceren's annual increases is based on the wage increases received by journeyman members of the Chicago Journeyman Plumbers Local Union 130, U.A., during the backpay period as set forth in the PCA and PAMCANI wage package pursuant to the provisions of the agreement effective June 1, 2014, to May 31, 2017. Beginning June 1, 2014, journeyman plumbers received an increase to the base wage of \$2.01 per hour. Beginning June 1, 2015, journeyman plumbers received an increase to the base wage of \$2.00 per hour.

Ceren's basic wage rate is adjusted annually on the pay period before his August 12 anniversary date to include the increases to the basic rate, as set forth above. (Exh. 1 to GC Exh. 1(f).) The accrued backpay is set forth for each calendar quarter beginning with the 3<sup>rd</sup> quarter of 2013 through the 3<sup>rd</sup> quarter of 2015, as follows:

3rd Quarter 2013	\$ 1,615
4th Quarter 2013	\$ 26,250
1st Quarter 2014	\$ 26,250
2nd Quarter 2014	\$ 26,250
3rd Quarter 2014	\$ 26,732
4th Quarter 2014	\$ 27,295
1st Quarter 2015	\$ 27,295
2nd Quarter 2015	\$ 27,295
<u>3rd Quarter 2015</u>	<u>\$ 27,775</u>
TOTAL THROUGH 9/30/2015	\$216,757

(GC Exh. 1(f), Exh. 1.)<sup>5</sup>

Ceren is entitled to be compensated for the adverse tax consequences of receiving the lump-sum backpay for a period over 1 year. *Don Chavas, LLC*, 361 NLRB 101 (2014). In order to determine the appropriate excess tax award, the amount of Federal and State taxes needs to be determined for the backpay as if the monies were paid when they were earned throughout the backpay period. Also, the amount of Federal and State taxes needs to be calculated for the lump sum payment if the payment was made this year. The excess tax liability should be calculated as the difference between these two amounts.

---

(<http://www.eia.gov>), and assuming that the vehicle Ceren drove achieved only 18 miles per gallon and he spent up to 2 hours driving traveling around of 80 miles per day, his fuel cost would equal about \$17.00 per day and no more than \$85.00 per week. This benefit is estimated to have an approximate retail value of \$340.00 per month at the peak average price in 2013. According to the EIA, the current average price for gasoline is presently \$2.40 for the Midwest and in 2014 down \$0.79 from a year earlier. Accordingly, the retail value of this benefit has been substantially reduced during the backpay period. The GC did not set forth a total amount owed to Ceren for this benefit.

<sup>5</sup> The quarterly figures come from Exhibit 1 to the compliance specification. The total of the quarterly figures is \$216,757. On brief, the General Counsel asserts that the gross backpay figure is \$216,755. (GC Br. p. 8.)

The amount of taxable income for each year is based on the calculations for backpay in the compliance specification for each of 2013, 2014, and 2015, and is summarized in Exhibit 3 to GC Exh. 1(f). Federal and State taxes were calculated using the Federal and State tax rates for the appropriate years. The Federal rates are based on Ceren's filing taxes as Married Filing Jointly/Widow. The amount of taxes owed for 2013 and 2014 would have been the amounts set forth in Exhibit 3 to GC Exh. 1(f). The total of these amounts are \$11,009 for Federal taxes and \$4270 for State taxes.

The total amount of the lump sum award subject to an excess tax award, at the time of the issuance of the compliance specification, was \$85,391 and is set forth in Exh. 3 to GC Exh. 1(f). The lump sum amount is based on the backpay calculations described in the compliance specification. The amount of taxes owed in 2015 is based on the current Federal and State tax rates and on the fact that Ceren will be filing his income taxes as Married Filing Jointly/Widow. The amount of taxes owed on the lump sum is calculated as \$12,935 for Federal taxes and \$3202 for State taxes as shown in Exh. 3 to GC Exh. 1(f).

The adverse tax consequence is the difference between the amount of taxes on the lump sum amount being paid in 2015 of \$12,935 for Federal taxes and \$3,202 for State taxes and the amount of taxes that would have been charged if these amounts were paid when the backpay was earned in 2013 and 2014: \$11,009 for Federal taxes and \$4270 for State taxes. Thus, the excess tax on backpay liability as of the date of the compliance specification is \$1,927 for Federal taxes as calculated and set forth in Exh. 3 to GC Exh. 1(f).<sup>6</sup>

The excess tax liability payment that is to be made to Ceren is also taxable income and causes additional tax liabilities. Exh. 3 to GC Exh. 1(f) also includes a calculation for these supplemental taxes. This amount is called the incremental tax on backpay. The incremental tax includes all of the taxes that Ceren will owe on the excess tax payment. This incremental tax is calculated using the Federal tax rate used for calculating taxes for the backpay award and that average State tax rate for 2015. This amount is \$777 and is shown in Exhibit 3 to GC Exh. 1(f).

The total excess taxes are the total tax consequences for Ceren receiving a lump-sum award covering a backpay period longer than 1 year. The amount of total excess taxes owed Ceren are \$2704 which is determined by adding the excess taxes and incremental taxes, as shown in Exh. 3 to GC Exh. 1(f).

Thus, as found by the Board, Ceren is owed \$216,757 in gross backpay. He is further owed \$2704 for excess taxes. Respondent's backpay, tax, and interest liability shall continue until such a time as Respondent effectuates its obligation to extend a valid offer of reinstatement or until the backpay liability is extinguished for nondiscriminatory reasons.

---

<sup>6</sup> There is no excess tax on Respondent's backpay liability for State taxes. Exh. 3 to GC Exh. 1(f).

## II. Ceren's Search for Work, Interim Earnings, and Expenses

### A. Search For Work

Following his discharge by Respondent, Ceren maintained his membership in Plumbers and Pipefitters Local 130 (Union).<sup>7</sup> (Tr. 13.) At his request, Ceren was placed on the Union's out-of-work list in July or August 2012. (Tr. 14.) Ceren remained on the list while he worked for Respondent. (Id.)

In addition, Ceren checked websites such as Career Builder, Indeed, LinkedIn, and Craigslist for new jobs "almost daily." (Tr. 25.) Ceren applied for work as a plumbing estimator, plumbing coordinator, superintendent, construction supervisor, and insurance inspector. (Tr. 25.) Ceren could not remember the names of all of the companies to which he applied for employment, but estimated that he applied for 40 to 50 positions. (Tr. 45.)

Ceren provided emails showing he applied for two plumbing positions in October 2013. Ceren applied for a plumbing position in DuPage County, Illinois, through Craigslist on October 22, 2013. (Tr. 34.) Ceren attached a copy of his resume. (GC Exh. 14.) Ceren also applied for a position with Drain Team in Tampa, Florida on October 22, 2013. (GC Exh. 15; Tr. 35.) Ceren was not offered either position. Moreover, in late October 2013, Ceren applied for reinstatement for a position with Pinellas County, but he was not offered reinstatement.<sup>8</sup> (GC Exhs. 18, 19; Tr. 33-34.)

Ceren kept a record of jobs he applied for from November 2013 through January 2014 and supplied this list to the Board. (GC Exh. 34; Tr. 34.) During this period, Ceren applied for work with 19 companies for the following positions: (1) Hogan Plumbing (estimator); (2) RHP Corp. (supervisor); (3) MJN Plumbing (not listed); (4) Midway Plumbing (purchasing coordinator); (5) Guardian Restoration Services (supervisor);<sup>9</sup> (6) Reaction Search International (insurance inspector); (7) Jones and Sons Plumbing (service manager); (8) Citi Plumbing, Inc. (plumbing foreman); (9) Construction Contractor Services (manager); (10) Rent Solutions (construction manager); (11) Morisey Dart (construction recruiter); (12) Aspen Square Management (construction supervisor); (13) Hughes Supply (plumbing sales); (14) American Homes (construction manager); (15) Clearwater Plumbing (not listed);<sup>10</sup> (16) TBPM, Inc. (plumbing superintendent); (17) Mears Plumbing (rough plumber); and (18) Gulf Coast Plumbing (material estimator); (19) R. J. Kielty (estimator). (GC Exh. 34; Tr. 36-41.) Of the jobs Ceren applied for during this period, 13 were in Florida, 2 were in Illinois, and 4 were in an unknown location.<sup>11</sup>

<sup>7</sup> Ceren was previously a member of Plumbers and Pipefitters Local 501. (Tr. 13.) These locals merged in 2013 or 2014. (Id.)

<sup>8</sup> Ceren was employed by Pinellas County in Florida prior to his employment with Respondent. (Tr. 33-34.)

<sup>9</sup> Ceren's emailed resume and cover letter are contained in GC Exh. 16.

<sup>10</sup> Ceren's emailed resume and cover letter are contained in GC Exh. 17.

<sup>11</sup> The four positions for which the locations were not listed were RSI, Rent Solutions, Hughes Plumbing, and American Homes.

In November 2013, Ceren learned of a position with Midway Services in Tampa, Florida, through the Internet. (Tr. 27.) Ceren sent a resume and cover letter to Midway through the Career Builder website. (GC Exh. 12(a)–(d); Tr. 28.) Ceren similarly applied for work with SR Plumbing through the Career Builder website. (GC Exh. 13; Tr. 30.)

In 2015, Ceren submitted a search for work report to the Board's compliance officer for the 1st and 2nd quarters of 2015. (GC Exh. 35.) During this period, Ceren applied for positions with the following employers: (1) Aerotek; (2) Morisey-Dart; (3) Kimmel & Associates; (4) Cadwell Plumbing; (5) Bears Plumbing; (6) Mears Plumbing; and (7) William Nash. (GC Exh. 35.) All of these positions were in Florida. (Id.) Aerotek, Morisey-Dart, and Kimmel & Associates are recruiting firms. (GC Exh. 35; Tr. 35.) He was not offered any positions through the recruiting firms or with the plumbing companies. (GC Exh. 35; Tr. 42–44.)

Ceren further applied for employment with the following companies: TSE; Midway Services; SR Plumbing; RJ Kielty; Gulf Coast Plumbing; Hogan Plumbing; MJM Plumbing; and Hughes Supply.<sup>12</sup> (Tr. 26, 27, 36.) He was not offered any of these positions. MJM Plumbing and Hogan Plumbing are located in Illinois. (Tr. 26–27.)

#### *B. Respondent's Evidence Regarding Available Jobs*

Respondent's owner, Michael Malak, has worked in the plumbing industry for over 30 years and has owned Respondent for 23 years. (Tr. 93–94.) Malak described the job market for union plumbers in Chicago in 2013 as "good." (Tr. 95.) Malak testified that his company has seen increasing revenues from 2013 to 2017. (Tr. 96.) He was not aware of any union plumber that had a difficult time finding work in the few years preceding the hearing. (Tr. 97.)

Respondent presented into evidence the Union's out-of-work lists for periods from 2013 through 2017. (Jt. Exhs. 2–6.) Union members who are out of work can request placement on this list. (Jt. Exh. 1, para. B.) Ceren appears on the lists in the following positions:

<u>Ceren's position/Total on list</u>	<u>Date of list</u>
462/953	10/04/2013 (Jt. Exh. 1, Jt. Exh. 2, p. 18)
335/889	01/02/2014 (Jt. Exh. 1, Jt. Exh. 3, p. 13)
197/590	01/05/2015 (Jt. Exh. 1, Jt. Exh. 4, p. 8)
Not listed	01/04/2016 (Jt. Exh. 5)
Not listed	01/03/2017 (Jt. Exh. 6)

Members who did not contact the Union periodically and did not respond to the Union's attempts to contact them were moved from the out-of-work list to the inactive out-of-work list (inactive list). (Jt. Exh. 1, para. C.)

<sup>12</sup> Ceren did not have documentation regarding his applications with Gulf Coast Plumbing, RJ Kielty, GSR, or Sutton. (Tr. 36.) However, I note in his list of positions sought, he listed "Sutton Insurance Bureau" under his application for Reaction Search International. (GC Exh. 34, p. 1.)

The Union contacted various members in December 2015 and asked if they wished to remain on the active out-of-work list. (Jt. Exh. 1, para. E(1).) According to Ceren's file, he requested to be placed on the Union's inactive list on December 23, 2015.<sup>13</sup> (Jt. Exh. 1, para. E(1); R. Exh. 14.) The Union did not have any correspondence from Ceren seeking employment assistance from 2013–2017. (Jt. Exh. 1, para. H.) Ceren does not appear on the Union's active out-of-work lists after 2015. (Jt. Exh. 1, para. F., Jt. Exh. 5, Jt. Exh. 6.) On the inactive lists, Ceren's name is listed as follows:

	<u>Ceren's position/Total on list</u>	<u>Date of list</u>
10	Not listed	12/09/2013 (Jt. Exh. 1, Jt. Exh. 7)
	Not listed	01/02/2014 (Jt. Exh. 1, Jt. Exh. 8)
	Not listed	12/12/2014 (Jt. Exh. 1, Jt. Exh. 9)
	Not listed	05/07/2015 (Jt. Exh. 1, Jt. Exh. 10)
15	13/28	01/05/2016 (Jt. Exh. 1, Jt. Exh. 11, p. 1)
	24/111	01/05/2017 (Jt. Exh. 1, Jt. Exh. 12, p. 1)

As noted by the General Counsel, in 2014 the name Monte Goss appears as number 337 on the Union's out-of-work list. Ceren appears as number 335 on that same list. (Jt. Exh. 3.) In January 2015, Ceren was number 197 and Goss was 99 on the Union's out-of-work list. Ceren was moved to the Union's inactive list in December 2015. However, in January 2016, Goss was number 116 of 375 and in January 2017 Goss was 35 of 220 on the Union's active out-of-work list. (Jt. Exhs. 5 and 6.)

In 2013, the name Thomas Splitek appears as number 396 on the Union's out-of-work list. (Jt. Exh. 2, p. 15.) In 2014, Splitek appears as number 292 on the list. (Jt. Exh. 3, p. 12.) In 2015, Splitek appears as number 174 on the list. (Jt. Exh. 4, p. 7.) In 2016, Splitek appears as number 102 on the list (Jt. Exh. 5, p. 4) and in 2017 Splitek appears as number 32 on the list. (Jt. Exh. 6, p. 2.)

In 2013, the name Joshua Felde appears as number 289 on the Union's out-of-work list. (Jt. Exh. 2, p. 11.) In 2014, Felde appears as number 230 on the list. (Jt. Exh. 3, p. 9.) In 2015, Felde appears as number 143 on the list. (Jt. Exh. 4, p. 6.) In 2016, Felde appears as number 88 on the list (Jt. Exh. 5, p. 4) and in 2017 Felde appears as number 29 on the list. (Jt. Exh. 6, p. 2.)

### *C. Interim Earnings*

Ceren found interim employment in January 2014. Ceren worked as a plumbing superintendent for TBPM Plumbing (TBPM) from January 2014 through November 30, 2015. (Tr. 22, 23.) At TBPM, Ceren supervised plumbers at an apartment complex. (Tr. 23.) He earned wages of \$47,725.15 (about 45% of his salary with Respondent) in 2014 and \$50,952.78 (about 48% of his salary with Respondent) in 2015 from TBPM. (GC Exhs. 10 and 11.)

---

<sup>13</sup> Ceren would have testified that he did not request to be placed on the inactive out-of-work list. (Jt. Exh. 1, par. E(2).) I have no basis on which to resolve this conflict. However, I do not find the conflict material because Ceren was actually moved to the inactive list in December 2015 and being on the active out-of-work list was not Ceren's only endeavor at seeking employment.

In November 2015, Ceren signed an employment contract with CMTS Construction Services (CMTS) in Jacksonville, Florida. (GC Exhs. 3, 5; Tr. 14–15.) He started working there in December 2015 and continued working for CMTS through the date of the hearing. Ceren is a QAQC coordinator inspector for CTMS, inspecting mechanical systems, plumbing, and fuel systems at airports. (Tr. 14–15.) Ceren is paid a salary of \$74,000 per year (about 70% of his salary from Respondent) for this work.<sup>14</sup> (Tr. 15.)

Aside from his employment with TBPM and CMTS, Ceren has had no other interim earnings following his unlawful discharge by Respondent. (Tr. 24.) There is no evidence that Ceren continued to search for work after obtaining his position with CMTS.

#### *D. Other Expenses*

At the hearing, the General Counsel moved to amend the compliance specification to include the following expenses: \$210 in fuel costs for moving from Illinois to Florida; \$50 in meal expenses while moving from Illinois to Florida; \$2850 in tax penalties for making early withdrawals from retirement accounts; \$331 for a round-trip airline ticket to attend the unfair labor practice hearing in this case; and \$296.95 for a round-trip airline ticket to attend the compliance hearing in this case. (Tr. 66.) I granted the General Counsel’s motion. (Tr. 66.)

Ceren made several early withdrawals from his retirement account after he was unlawfully discharged by Respondent. In October 2013, Ceren withdrew \$2100 from his retirement account. (GC Exh. 24; Tr. 49.) In December 2013, he withdrew another \$4000 from his account. (GC Exh. 25; Tr. 49.) In total, Ceren withdrew a total of \$15,100 from his retirement account in 2013. (GC Exh. 26; Tr. 50.) However, only \$6100 of this amount was withdrawn after his discharge by Respondent. (Tr. 50.) Ceren incurred a 10% penalty (\$610) for these early withdrawals after his discharge by Respondent. (Tr. 51.) Ceren testified that he withdrew this money for “money to live,” and items such as groceries, and fuel. (Tr. 52–53.)

In 2014, Ceren withdrew an additional \$3529.42 from his retirement account. (GC Exh. 29.) Ceren also withdrew \$814.05 from his Pinellas County FRS account in 2014. (GC Exh. 30.) Ceren testified that, he was “almost forced to take it because less than \$1000.” (Tr. 54–55.) As a result of these withdrawals, totaling approximately \$4343, Ceren incurred a tax penalty of \$434 in 2014. (GC Exh. 28; Tr. 56.)

In 2015, Ceren withdrew \$11,058 from his retirement account and incurred a penalty of \$1106. (GC Exhs. 31, 32; Tr. 58.) Ceren did not take any early withdrawals from his retirement accounts in 2016. In 2017, prior to the compliance hearing, Ceren withdrew \$5950 from his retirement account and \$1000 in taxes was deducted from the account. (GC Exh. 33.) Ceren testified that he received about \$7000 as a result of the 2017 distribution. Although he had not received a Form 1099-R for 2017 at the time of the hearing, Ceren expected to incur a 10% penalty as a result of his 2017 early withdrawal (about \$700). (Tr. 61.)

---

<sup>14</sup> According to his W-2 Forms, Ceren received \$3529 in 2015, \$77,292.95 in 2016, and \$46,481.50 in 2017 through July 29 from TPMS. (GC Exhs. 7, 8, 9.)

The General Counsel also asserts that Ceren should be reimbursed for his travel to and from the unfair labor practice hearing in 2014 and the compliance hearing in 2017. In 2014, Ceren paid \$331 for airline tickets to attend the unfair labor practice hearing. (GC Exh. 22; Tr. 62.) In 2017, Ceren paid \$296.95 for airline tickets to attend the compliance hearing. (GC Exh. 23; Tr. 64.)

Following his discharge by Respondent, Ceren remained in Illinois. Ceren did not obtain an Illinois driver's license, did not register to vote in Illinois, and did not own any property in Illinois. (Tr. 81-82.) Eventually, after finding work with TBPM, Ceren returned to Florida.

The General Counsel contends that Ceren should be reimbursed for moving expenses from Illinois to Florida. When Ceren received his job offer from TBPM in Florida, he was living in Illinois. Ceren drove from Illinois back to Florida. (Tr. 46.) Ceren produced receipts for \$175.91 in fuel costs.<sup>15</sup> Ceren further testified that he spent additional money on fuel and meals, for which he did not have receipts.<sup>16</sup> (GC Exh. 21(a), (b), (c); Tr. 47-48.)

### III. Analysis and Conclusions

#### A. Credibility Findings

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622. Credibility of the witnesses is not generally at issue in this case, as there was little variation between the testimony and evidence. Where necessary, however, my credibility findings are generally incorporated into the findings of fact set forth above.

I found Ceren to be a generally credible witness. He testified in a forthright and sure manner. Much of his testimony was supported by documentary evidence. For example, much of Ceren's testimony regarding his search for work was supported by emails and reports to the Board. Ceren's testimony regarding his consequential damages was largely supported by receipts. As such, I credit Ceren's testimony regarding his search for work and interim earnings.

I also found Malak to be a generally credible witness. He testified in an earnest and steady manner. However, his testimony regarding the availability of work in the Chicago area job market was both vague and self-serving. Malak provided no support for this testimony, other

<sup>15</sup> I came to this total by adding up the receipts contained in GC Exh. 21 that were not duplicative: \$29.05 (WILCO, Monteagle, TN); \$35.69 (Speedway, Lafayette, IN); \$29.88 (Speedway, Elizabethtown, KY); \$20.00 (QT, Buford, KY); \$26.09 (Hess, Wesley Chapel, FL); \$35.20 (Raceway, Valdosta, GA).

<sup>16</sup> The additional amount spent by Ceren was not made clear in the record. His testimony was that he spent, "Probably 50 bucks, \$50. And meals. Probably another 60, \$70 dollars in fuel that's not covered here." (Tr. 48.) The General Counsel did not seek to have Ceren clarify this answer.

than his anecdotal assertions. Therefore, I do not credit Malak's testimony regarding the availability of employment in the Chicago area job market during the backpay period.

*B. Interim Earnings and Search for Work*

In a compliance proceeding, after the General Counsel has shown the amount of gross backpay due, the respondent has the burden of establishing affirmative defenses to mitigate its liability, including willful loss of interim earnings. *Millennium Maintenance & Electrical Contracting, Inc.*, 344 NLRB 516, 517 (2005), citing *Chem Fab Corp.*, 275 NLRB 21, 21 (1985), enf. mem. 774 F.2d 1169 (8th Cir. 1985). A claim that a discriminatee did not make reasonable efforts to find interim employment, and thus failed to mitigate damages, is an affirmative defense for which the respondent bears the ultimate burden of proof. *St. George Warehouse*, 351 NLRB 961, 961 (2007).

In *St. George Warehouse*, the Board set forth a burden-shifting standard regarding the issue of mitigation, noting that "[t]he contention that a discriminatee has failed to make a reasonable search for work generally has two elements: (1) there were substantially equivalent jobs within the relevant geographic area, and (2) the discriminatee unreasonably failed to apply for these jobs." 351 NLRB at 961. Thus, the respondent bears the initial burden of going forward with evidence to show that there were substantially equivalent jobs within the geographic area. *Id.* If the respondent satisfies this burden, then the burden shifts to the General Counsel to produce competent evidence of the reasonableness of the discriminatee's job search. 351 NLRB at 967. The General Counsel may meet this burden by producing the discriminatee to testify as to his efforts at seeking employment, or by introducing other competent evidence regarding the discriminatee's job search. 351 NLRB at 964.

It is well settled that "the test for mitigation is not measured by an individual's success in gaining employment, but rather by the efforts made to seek work." *The Lorge School*, 355 NLRB 558, 560 (2010), quoting *Essex Valley Visiting Nurses Assn.*, 352 NLRB 427, 429 (2008). Whether a claimant's search for employment has been reasonable is evaluated in light of all of the circumstances. *The Lorge School*, 355 NLRB at 560, citing *Pope Concrete Products*, 312 NLRB 1171 (1993), enf. mem. 67 F.3d 300 (6th Cir. 1995); *Cornwell Co.*, 171 NLRB 342, 343 (1968). Furthermore, it is measured over the backpay period as a whole, not isolated portions thereof. *The Lorge School*, 355 NLRB at 560, citing *First Transit Inc.*, 350 NLRB 825, 825 fn. 8 (2007) and *Wright Electric*, 334 NLRB 1031 (2001), enf. 39 Fed. Appx. 476 (8th Cir. 2002). Any doubt or uncertainty in the evidence is resolved in favor of the employee claimant and not the respondent. 355 NLRB at 560 citing *Jackson Hospital Corp.*, 352 NLRB 194, 200 (2008); see also *NLRB v. NHE/Freeway, Inc.*, 545 F.2d 592, 594 (7th Cir. 1976); *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 572-573 (5th Cir. 1966). The Respondent does not meet its burden of showing an inadequate job search by presenting evidence of lack of employee success in obtaining interim employment or of low interim earnings. 355 NLRB at 560 citing *Food & Commercial Workers Local 1357*, 301 NLRB 617, 621 (1991).

Respondent's evidence at trial regarding the availability of substantially equivalent jobs consisted of: Malak's testimony that the job market for union plumbers was "good" during the backpay period; and copies of the Union's out-of-work lists during the backpay period. This evidence is not specific or informative as to the availability of jobs in the Chicago area job

market following Ceren's discharge. Thus, I do not find that Respondent met its initial burden of establishing that there were substantially equivalent jobs within the relevant geographic area, as required under *St. George Warehouse*.

Even, assuming arguendo, I found that Respondent met its initial burden; I would find that the Ceren's search for work was reasonable. Ceren's uncontroverted testimony established that he applied for 40 to 50 positions in a period of less than a year-and-a-half. Ceren had documentary evidence of applications to 31 different employers. Ceren first obtained interim employment in January 2014 with TBPM and later found work with CMTS. Even though Ceren's interim employment was for a lower salary than that paid by Respondent, he ultimately obtained a position paying about 70% of what he earned working for Respondent. Thus, I find his job search to be reasonable.

Ceren had interim earnings during the above period, which would offset Respondent's backpay obligation, as follows:

3rd Quarter 2013	\$0
4th Quarter 2013	\$0
1st Quarter 2014	\$ 9,000
2nd Quarter 2014	\$14,000
3rd Quarter 2014	\$12,000
4th Quarter 2014	\$14,000
1st Quarter 2015	\$15,800
2nd Quarter 2015	\$15,350
3rd Quarter 2015	\$15,350
TOTAL THROUGH 9/30/2015	\$95,500

(GC Exh. 1(f), Exh. 1.) The Board has found that through September 30, 2015, Ceren is owed \$216,757 in gross backpay. Subtracting Ceren's \$95,500 interim earnings from his \$216,757 total gross backpay results in a net backpay figure of \$121,257.<sup>17</sup> Ceren is further owed \$2704 in incremental and excess tax liability. Thus, I find that Respondent's total net backpay liability, calculated through the end of the 3rd quarter of 2015, is \$123,961. Respondent's backpay, tax, and interest liability continues and must be determined for the period beginning with the 4th quarter of calendar year 2015 until such a time as Respondent effectuates its obligation to extend a valid offer of reinstatement or until the backpay liability is extinguished for nondiscriminatory reasons.

### *C. Other Expenses*

I do not find that Ceren is entitled to consequential damages flowing from his discharge by Respondent. The General Counsel seeks make-whole relief and has asked that I order Respondent to pay consequential damages to reimburse Ceren for economic harm that he incurred as a result of Respondent's unfair labor practices. Specifically, the General Counsel

<sup>17</sup> Although Exhibit 1 to the compliance specification indicates the total net backpay is \$121,255, adding all of the net backpay figures in this exhibit results in a sum of \$121,257.

asks that Ceren be reimbursed for his travel to and from the hearings, for his moving expenses as a result of finding a job in another state, and for his early withdrawals from his retirement accounts and associated tax penalties.

The relief sought by the General Counsel would require a change in extant Board law, which I have no authority to order. The Board has indicated that it is not prepared to deviate from its current remedial practice and will not order reimbursement of consequential damages. *Omnisource Corp.*, 366 NLRB No. 23, slip op. at 1 fn. 2 (2018). It is well settled that administrative law judges of the National Labor Relations Board are bound to follow Board precedent which neither the Board nor the Supreme Court has reversed, notwithstanding contrary decisions by courts of appeals or district courts. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984); *Pathmark Stores, Inc.*, 342 NLRB 378, 378 fn. 1 (2004). As such, I am bound to follow extant Board law. Therefore, I do not order Respondent to reimburse Ceren for any consequential damages.

#### D. Respondent's Arguments

I am not persuaded by Respondent's criticisms of Ceren for not providing more documentary evidence regarding his job search. Ceren plausibly and credibly explained that his job search was primarily conducted online, and that he did not always print out copies of online applications. There is no requirement that a discriminatee keep original source documentation of his job search efforts. *The Lorge School*, 355 NLRB at 561. Furthermore, it is not required that a discriminatee corroborate his or her testimony. *Id.* citing *Heinrich Motors v. NLRB*, 403 F.2d 145, 149 (2d Cir. 1968). Corroboration can be of assistance if there is a dispute, but here, Ceren's credible testimony stands uncontradicted.

Furthermore, as the Board stated in *United Aircraft Corp.*, 204 NLRB 1068 (1973), "the backpay claimant should receive the benefit of any doubt rather than the Respondent, the wrongdoer responsible for the existence of any uncertainty and against whom any uncertainty must be resolved." *C F Air Freight, Inc.*, 276 NLRB 481, 484 (1985). A discriminatee who accepts appropriate employment at lower pay should not be penalized and required to seek employment at a higher wage. *C F Air Freight, Inc.*, 276 NLRB at 484; see also *Sioux Falls Stock Yards*, 236 NLRB 543, 570 (1978). Moreover, as set forth in *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307 (D.C. Cir. 1972), doubts as to when a claimant is justified in lowering his sights should be resolved in favor of the discriminatee. *United Aircraft Corp.*, 204 NLRB at 1068.

Although the discriminatee must make reasonable efforts to mitigate his loss of income, he is held only to reasonable exertions, not to the highest standard of diligence. *Chaim Babad, et al.*, 307 NLRB 13, 15-16 (1992), citing *NLRB v. Arduini Mfg. Co.*, 394 F.2d 420, 422-423 (1st Cir. 1968). The law only requires an "honest, good faith effort." *Id.* citing, *NLRB v. Cashman Auto Co.*, 223 F.2d 832, 836 (1st Cir. 1955). What constitutes reasonable efforts depends upon the circumstances of each case, an examination of the entire backpay period, not upon a purely mechanical examination of the number or kind of applications for work made by the discriminatee. See *Mastro Plastics Corp.*, 136 NLRB 1342, 1359 (1962). Instead, it is well settled that an employee who accepts appropriate employment at lower pay is not required to search for a better job. *Sioux Falls Stock Yards*, 236 NLRB at 570.

In this case, Ceren applied for 40 to 50 jobs over the course of just over a year. Even after obtaining interim employment with TBPM, he continued his job search. Eventually, Ceren obtained employment with CMTS. At CTMS, he earned about 70% of the salary he earned with Respondent. I do not find that Ceren prematurely lowered his sights as argued by Respondent. Instead, I find that Ceren conducted a reasonable search for work and reasonably mitigated his damages by accepting interim employment when it was offered.

Respondent's argument that Ceren did not properly follow up with the Union in his search for work is similarly flawed. Ceren's name appeared on the Union's out-of-work list from 2013 until the end of 2015—a time when he had found interim employment. Signing up for the Union's out-of-work list was not Ceren's only means to find employment. As noted above, Ceren submitted numerous job applications resulting in his obtaining two separate positions. Furthermore, there is no evidence in the record that there was any requirement that Union members on the out-of-work list contact the Union for employment assistance. Under these circumstances, I find that Ceren's search for work was reasonable.

Comparing Ceren's position on the Union's out-of-work list with others on the list establishes that Ceren may not have ever reached the top of the active out-of-work list. In 2013, Ceren was number 462 on the active out-of-work list, while Splitek was 396 and Felde was 289. (Jt. Exh. 2.) In 2014, Ceren was number 335 on the list, while Goss was 337, Splitek was 292, and Felde was 289. (Jt. Exh. 3.) In 2015, Ceren was number 197 on the list, while Goss was number 199, Splitek was number 174, and Felde was number 143. (Jt. Exh. 4.) Ceren was removed from the active out-of-work list in December 2015.

In January 2016, Goss was number 116 on the list, while Splitek was number 102, and Felde was number 88. (Jt. Exh. 5.) By 2017, Goss was number 35 on the list, Splitek was number 32, and Felde was number 29. (Jt. Exh. 6.)

In examining these lists, it does not appear that Ceren would have moved to the first position on the list, even if he had remained on the Union's active out-of-work list beyond December 2015. Other union members appearing on the list close to Ceren's position beginning in 2013 and 2014 did not make it to the top of the list by 2017. There is no evidence in the record as to what Goss, Splitek, and Felde might have done to obtain union jobs other than remaining on the active out-of-work list. As such, I do not accept Respondent's arguments that Ceren's efforts at obtaining work through the Union's hiring hall were insufficient.

Thus, I have rejected Respondent's affirmative defenses and found that Respondent did not meet its initial burden of establishing that there were substantially equivalent jobs within the relevant geographic area. Even if I were to find that Respondent met this initial burden, I find that Ceren made a reasonable search for employment. In summary, I find that through September 30, 2015, Ceren is owed \$216,757 in gross backpay. Subtracting Ceren's \$95,500 interim earnings from his \$216,757 gross backpay, results in a net backpay figure of \$121,257. Ceren is further owed \$2704 in incremental and excess tax liability. Thus, I find that Respondent's net backpay liability is \$123,961 through the end of the 3rd calendar quarter of 2015. Respondent's backpay, tax, and interest liability continues and must be determined for the period beginning with the 4th quarter of calendar year 2015 until such a time as Respondent

effectuates its obligation to extend a valid offer of reinstatement or until the backpay liability is extinguished for nondiscriminatory reasons.

### SUPPLEMENTAL ORDER

The Respondent, M & M Affordable Plumbing, Rockdale, Illinois, its officers, agents, successors, and assigns, shall make whole discriminatee Jeffery Ceren, as follows:

1. Pay to Ceren \$123,961 net backpay, plus interest computed and compounded daily as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010), accrued to the date of payment, minus tax withholdings required by Federal and State law.<sup>18</sup>

2. Within 21 days of the Board's order, file a report allocating backpay to the appropriate calendar years with the Regional Director for Region 13. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

3. Respondent shall compensate Jeffery Ceren for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, as set forth above.

4. Respondent's backpay, tax, and interest liability continues and must be determined for the period beginning with the 4th quarter of calendar year 2015 until such a time as Respondent effectuates its obligation to extend a valid offer of reinstatement or until the backpay liability is extinguished for nondiscriminatory reasons.

Dated, Washington, D.C. March 9, 2018



Melissa M. Olivero  
Administrative Law Judge

<sup>18</sup> As noted above, this lump-sum amount covers backpay, interest, and tax liability through September 30, 2015. Backpay, interest, and tax liability shall continue to accrue until Respondent extends Ceren a valid offer of reinstatement or when Respondent's reinstatement obligation is otherwise extinguished for nondiscriminatory reasons.